

**MINUTES OF A MEETING  
OF THE CORPORATIONS COMMITTEE  
OF THE BUSINESS LAW SECTION  
OF THE STATE BAR OF CALIFORNIA**

**August 1, 2008**

The Corporations Committee ("Corp Com") of the Business Law Section (the "BLS") of the State Bar of California held a regular meeting at The Westin San Francisco Airport Hotel in Millbrae, California on August 1, 2008. Attendance was as follows:

**MEMBERS PRESENT:**

W. Derrick Britt  
Richard Burt  
Nelson Crandall  
Edward A. Deibert  
Christopher Delfino  
Samuel C. Dibble  
Michael I. Froch\*  
Bryan Gadol  
Steve Harmon  
David Hernand  
Charles Ortmeyer  
Anne Marie Peters  
David Serepca  
James J. Thompson\*

**MEMBERS ABSENT:**

Bruce Deming  
Sharon R. Flanagan  
Jeffrey Hartlin  
Nina Hong  
Barbara Mathews  
Mike Occhiolini  
Rose Sorensen  
Jennifer Sostrin  
Russ Wood

**LIAISONS AND GUESTS PRESENT:**

Steve Hazen, Executive Committee  
Stewart L. McDowell, Executive Committee  
Colleen Monahan\*, Department of Corporations  
Salony Mehrok\*, Department of Corporations  
Karol Pollack\*, Securities and Exchange Commission  
Todd Vlaanderen, Secretary of State

\*Via telephone

The order of presentation of the items below does not necessarily reflect the order of discussion of the items at the meeting. Corp Com did not take up topics that are not described in these minutes.

## **I. ADMINISTRATIVE MATTERS**

1. Opening Remarks and Announcements: Co-Chair Chris Delfino called the meeting to order at 9:30 a.m.
2. Approval of Minutes: Richard Burt noted that he was present by telephone at the June 2008 meeting instead of absent. The Corp Com members present otherwise approved the minutes for the June 2008 meeting in the form circulated.

## **II. AGENCY REPORTS**

1. Securities and Exchange Commission: Karol Pollack reported the following:
  - a. There are two new commissioners, bringing the number of commissioners up to four.
  - b. The SEC is currently focusing on a rash of market manipulation in the form of false rumors accompanied by insiders selling short.
  - c. The SEC has extended protections against naked short selling in certain financial institution securities.
  - d. FMAC become an SEC reporting company.
  - e. The SEC has been providing a lot of guidance to mutual fund managers and others on various matters, including providing information on corporate web sites.
2. Department of Corporations: Colleen Monahan and Salony Mehrok reported the following:
  - a. Alan Weinger is currently serving as the acting Deputy Commissioner.
  - b. Ms. Monahan has been appointed Deputy Commissioner for the Office of Legislation and Policy.
  - c. The Department is currently spending a lot of its time and resources on lending issues.
  - d. The Department has formally opposed AB 2944.
  - e. Legislation the Department is following include AB 2149.
  - f. The Department is studying *People v. Cole* to determine whether it would be appropriate for the Department to issue a clarifying release.
3. Secretary of State: Todd Vlaanderen reported that proposed name registration regulations are on the Secretary's desk, and that various regulations are before the Office of Administrative Law.
4. Office of Governmental Affairs. No report.

## **III. LIAISON REPORTS**

1. Alternative Dispute Resolution Committee: Steve Harmon reported that the ADR Committee has not met since the last Corp Com meeting.

2. Cyberspace Law Committee: James Thompson reported that the Cyberspace Law Committee has not met since the last Corp Com meeting.
3. Financial Institutions Committee: Michael Occhiolini, the liaison to the Financial Institutions Committee, was absent.
4. Nonprofit and Unincorporated Organizations Committee: Bruce Deming, co-liaison to the Nonprofit and Unincorporated Organizations Committee, was absent. Michael Froch, the other liaison, was on the telephone and had nothing to report.
5. Partnerships and Limited Liability Companies Committee: Sharon Flanagan, liaison to the Partnerships and Limited Liability Companies Committee, was absent.
6. Uniform Commercial Code Committee: Charles Ortmeier, the liaison to the Uniform Commercial Code Committee, had nothing to report.
7. Agribusiness Committee: Russ Wood, the liaison to the Agribusiness Committee, was absent.
8. Insolvency Committee: David Serepca, liaison to the Insolvency Committee, reported that the Insolvency Committee meets at the same time as Corp Com, and so he has not been able to attend meetings. However, he has copies of the materials circulated to the members of the Insolvency Committee for those Corp Com members who are interested. The Insolvency Committee is working on four significant Affirmative Legislative Proposals (“ALPs”), one of which involves updating all the references in the California statutes to the federal bankruptcy law.
9. Executive Committee: Steve Hazen reported on other ALPs before the Executive Committee. Mr. Hazen complemented Corp Com on its leadership with respect to ALPs. Mr. Hazen also encouraged the members of Corp Com to attend the breakfast meeting of the Business Law Section and the annual meeting of the State Bar in Monterey in September, and to attend the Corp Com presentation on recent developments.

#### IV. SUBCOMMITTEE REPORTS

1. Legislation:
  - a. AB 2944 Amendment to Section 309 (B Corporations): Ed Deibert reported on a meeting that Bar President Jeff Bleich had called to understand and possibly reconcile various parties concerning this legislation, which would amends Section 309 of the Corporations Code to specify that, in considering the best interests of the corporation, the director may consider the interests of the corporation's employees, the impact on the community, and the environment, in addition to or instead of, the interests of the shareholders. Mr. Deibert characterized the meeting as constructive, and stated that President Bleich was

satisfied with the meeting. A lengthy discussion of the pros and cons of AB 2944, in which most of the members present participated, followed. ACTION TAKEN: The members present voted unanimously, with David Serepca abstaining, to authorize the legislative subcommittee to ask Governor Schwarzenegger to veto AB 2944 should it pass.

b. Potential ALP re Householding: Derrick Britt reported that Corp Com's ALP on "householding" (elimination of multiple copies of notices and reports to shareholders with common addresses) had been approved by the Office of Governmental Affairs and was before the Board of Governors.

c. SB 1409 re Annual Reports: Mr. Britt reported that the Governor has signed AB 1409 and that it is now law. A corporation that has an outstanding class of securities registered under Section 12 of the Exchange Act of 1934 may now satisfy the obligation to send an annual report to shareholders under Section 1501 of the California General Corporation Law by complying with SEC Rule 14a-16.

d. S 2956, the Incorporation Transparency and Law Enforcement Assistance Act. Charles Ortmeyer reported on S 2956, which would require the States to obtain a list of the beneficial owners of each corporation and LLC formed under their laws, ensure that the information is updated annually, provide the information to law enforcement, and subject violations to civil and criminal penalties. Impetus for legislation is primarily to hamper tax evasion and money laundering. A lengthy discussion of the pros and cons of S 2956, in which most of the members present participated, followed. The sense of the Corp Com members was that Corp Com should comment on the provisions of S 2956 that will impact the practice of corporate law in California.

e. People v. Cole. This case held that officers and directors of issuers satisfy the statutory definition of broker-dealer unless they receive a commission for the sale of securities.

2. Communications/Website: Ed Deibert reported on developments with respect to the committee web site, particularly changes designed to make it easier to update the site, thereby making it more useful to practitioners. Mr. Deibert also solicited submissions for new articles for the committee's e-bulletin.
3. Education/Publications: Sam Dibble reported on Corp Com's upcoming CLE presentation at annual meeting in September. Sam also asked people to submit articles to the Business Law News. The next deadline for submission is in September. There may be a webinar comparing the fiduciary duties of for-profit and non-profit corporation directors.
4. Corporate Law Departments/Litigation. Charles Ortmeyer reported on *Regents of University of California v. Superior Court*, an opinion of the 4<sup>th</sup> District Court of Appeal released on July 30, 2008, in which the Court of Appeal held that the defendant energy companies did not waive the attorney-client privilege with

respect to documents they disclosed to government investigators in a criminal investigation. The DCA held observed that a valid waiver must be "without coercion," and that coercion is present when the federal government advises corporations under criminal and regulatory investigation that they might avoid indictment or regulatory sanctions if they fully cooperated in the government's investigation and among other matters waive the attorney-client and attorney work product privileges. This decision, while confirming that the federal government's policy is coercive, undermines the purpose of the attorney-client privilege, which is to encourage frank communication between attorney and client. There was a discussion of what would be involved if Corp Com were to propose to submit an amicus brief if the case were to be heard before the California Supreme Court.


## **V. ONGOING PROJECTS**

1. Business Entity Name Issues. There was nothing to add to the information already presented by Mr. Vlaanderen.
2. ABA Presidential Task Force on the Attorney-Client Privilege: Michael Froch reported that the deadline for comments on the proposed change to FAS 5 is August 8, 2008. Ed Deibert reported that the date for oral argument in the CRLA case has been set.

## **VI. NEW BUSINESS**

1. Request for Amicus Support: Mr. Delfino reported that Corp Com had been asked if it wished to submit an amicus brief in an appeal involving the question of whether an officer of a parent corporation is privileged to interfere in the contractual relations of its subsidiary corporation. It was noted that the current procedural posture of the case did not satisfy the Bar's criteria for submitting an amicus brief.
2. Venture Capital Opinion Project: Nelson Crandall reported that the Venture Capital Opinions Subcommittee of the Opinions Committee has invited interested members of Corp Com to work with it on its proposed project. Richard Burt and Anne Marie Peters, Steve Harmon, and David Hernand volunteered to work on the project, with Ms. Peters coordinating the committee's efforts.

The meeting adjourned at approximately 12:30 p.m.



Nelson D. Crandall, secretary of the meeting